

NTSB Order No. EA-4731

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 4th day of December, 1998

Docket SE-14354

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached. Respondent has filed a brief on appeal, to which the Administrator replied.

sections 91.13(a) and 121.570(a) when, as pilot-in-command (PIC) of a DC-9 in passenger-carrying service on October 21, 1994, respondent began pushback of the aircraft with all passengers not yet seated, overhead bins open, and the emergency slides inactive.<sup>2</sup> After considering the facts and NTSB precedent, the law judge reduced the sanction from a 30-day to a 7-day suspension of respondent's airman certificates, including his Airline Transport Pilot (ATP) certificate.<sup>3</sup> We deny the appeal.

At hearing, Major Paul Stokes, a passenger on the flight at issue, testified that he was seated on the aircraft, reading a magazine, when he felt the "initiation of the push" and a lurch of the aircraft.<sup>4</sup> (Tr. at 19.) While the aircraft was moving, he looked up and noted that some people were standing and cargo bins were open. (Tr. at 20.) He then saw the flight attendant arm the exit slide on the door near the galley. (Tr. at 21-22.)

Another passenger, a chief master sergeant and maintenance auditor with the U.S. Air Force, Air Carriers Survey Analysis Office, testified regarding the flight. He stated that after he

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<sup>2</sup>Section 91.13(a) prohibits the operation of an aircraft "in a careless or reckless manner so as to endanger the life or property of another." Section 121.570(a) prohibits moving a passenger-carrying aircraft on the surface, taking off, or landing unless "each automatically deployable emergency evacuation means ... is ready for evacuation."

<sup>3</sup>The Administrator has not appealed the reduction in sanction.

<sup>4</sup>At the time of this flight, Major Stokes worked in the Air Carriers Survey and Analysis Office, U.S. Air Force Headquarters Air Mobility Command. (Transcript (Tr.) at 13.) He also holds an ATP certificate with a multiengine land rating. (Tr. at 15.)

felt the aircraft moving, he saw a passenger walk down the aisle carrying a piece of luggage and was concerned that she might fall.<sup>5</sup> (Tr. at 49.) Further, one of the flight attendants recalled that the aircraft pushed back while a passenger was still trying to find a seat. (Tr. at 70, 74.) She immediately alerted the captain and he stopped the aircraft. (Tr. at 78-79.) She then armed the emergency exit. (Tr. at 79.)

On appeal, respondent contends that the evidence supports neither a direct nor a derivative finding of a violation of FAR section 91.13(a). He also maintains that he reasonably relied on the flight attendants to properly perform their duties and that he should not be held accountable for their failure to fulfill their responsibilities. Specifically, he notes that the flight attendants were required to see that the emergency doors were armed, the overhead bins closed, and the passengers seated before pushback.

While we have often acknowledged that the PIC is responsible for the safe operation of an aircraft, there have been instances where the PIC was found to have reasonably relied on another crewmember to perform a particular task. See, e.g., Administrator v. Fay and Takacs, NTSB Order No. EA-3501 (1992). This, however, is not such an instance.

There was no evidence introduced at hearing to show that,

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<sup>5</sup>A third passenger, also with the Air Carriers Survey and Analysis Office, testified by deposition that, as the aircraft was pushing back, he observed people in the aisle and the overhead bins open. (Exhibit A-2 at 28.)

before respondent began pushback, the lead flight attendant made the announcement for flight attendants to prepare doors for departure and crosscheck.<sup>6</sup> Although respondent asserts that he was not careless, given that he turned around and, in his words, took a "glance" into the cabin of the aircraft to ascertain whether it appeared secure, his action cannot be viewed as being sufficient to substitute for verbal confirmation from the lead flight attendant on the status of the cabin. While he may have seen no one standing, if the passenger had stepped into the galley, as the flight attendant believes, respondent would not have seen her. In any event, respondent never confirmed with the lead flight attendant whether or not the cabin was secure for departure.<sup>7</sup>

Respondent argues that it was the flight attendant's job to tell him the cabin was not ready for departure, not his obligation to inquire. While this may be true, the fact remains that respondent began pushback before being adequately assured the cabin was secure.<sup>8</sup> As was revealed through testimony, the

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<sup>6</sup>Under TWA procedure, the attendants arm the doors immediately after the announcement is made. (Tr. at 108.)

<sup>7</sup>Respondent, as an ATP, is required to exercise the highest degree of care. Whether or not he may have been justified in his conclusion that, because the aircraft door was closed, then all overhead bins must already be closed since, per TWA procedure, the aircraft door is shut after the overhead bins have been closed, he nevertheless did not exercise the highest degree of care by assuming, without word from the lead flight attendant, that the cabin was ready for pushback.

<sup>8</sup>Respondent quotes in his appeal brief from the "Gate Push Procedure" in the TWA Policy Manual. The manual, however, was never offered into evidence. Wendy Wade, the Director of Flight

lead flight attendant is required to advise the cockpit crew when the cabin is ready for departure and, if that situation changes, to update the crew. (Tr. at 124.) Respondent had not received the notice because the cabin was not ready for departure. By commencing pushback with passengers standing, respondent violated FAR section 91.13(a).<sup>9</sup> Accord, Administrator v. Lawson, 5 NTSB 1514, 1515 (1986)(potential danger from taxiing with passengers standing is not remote; such action is careless, in violation of

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Operations Training Support at TWA, intimates that the Policy Manual, at the time of the incident, only advised the cockpit crew that the lead flight attendant would notify the cockpit if the cabin was not secure for departure. (Tr. at 110-11.)

Nevertheless, Ms. Wade also testified that, according to the Flight Attendant's Manual, the lead flight attendant has the duty to "advise the cockpit crew when the aircraft is ready for push." (Tr. at 110.) Respondent acknowledged that he was aware of this requirement. (Tr. at 100.) Therefore, even if the Policy Manual was ambiguous, respondent nevertheless knew that the lead flight attendant would notify him when the cabin was secure. It is undisputed that he began pushback before being so notified.

<sup>9</sup>The Fifth Circuit, in Administrator v. Tearney, 868 F.2d 1451 (5<sup>th</sup> Cir. 1989), recognized that taxiing while passengers are standing is deservedly considered a violation of FAR section 91.9 (now 91.13(a)), stating that the prohibition against such conduct "is not a departure from the general safety requirements set forth in section 91.9, but is, rather, a specific articulation of what is required by that section." Id. at 1453.

The court went on to say,

We are mindful of the fact that the NTSB, charged by Congress with special responsibilities in the area of transportation safety, concluded that 'the general policy that passengers must be seated before the aircraft departs the boarding area ... is a well-established safety policy....' Administrator v. Lawson, [5 NTSB 1514, 1516] (1986).

Id. at 1453-54.

section 91.13(a)).

Finally, respondent asserts that the Administrator abused the discovery process by withholding, through an objection based on attorney-client privilege and work product, Section D of the Enforcement Investigative Report (EIR).<sup>10</sup> He claims that during the August 14, 1996 deposition of FAA aviation safety inspector David Dees, he learned that the report may have been improperly withheld but that, since it was so close to the date of the hearing (August 27, 1996), there was not enough time to file a motion to compel discovery.<sup>11</sup> Instead, respondent's counsel made a preliminary objection at hearing and sought dismissal of the case. (Tr. at 5-7.)

The law judge noted that a motion to compel had not been filed and denied the motion to dismiss. We find no error in his disposal of the matter. Irrespective of the short time frame, a motion to compel should have been the procedure to deal with the discovery issue and, in any event, Board precedent is clear that information of the type sought is protected from disclosure.<sup>12</sup>

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<sup>10</sup>The Administrator's objection also cited "applicable case law [that] protect[s] from disclosure analyses, review, reports, or other documents which are contained in Section 'D' of the subject enforcement investigative file." Complainant's Response to First Set of Interrogatories and Request for Production of Documents, May 23, 1996, at ¶ 6.

<sup>11</sup>We also note that, although respondent refers extensively in his appeal brief to the deposition transcript of Mr. Dees, it was never admitted into evidence.

<sup>12</sup>Respondent also argues that the Administrator abused her discretion by prosecuting this case. It is not, however, the Board's role to review the prosecutorial discretion of the Administrator. See Administrator v. Heidenberger, NTSB Order No.

See Administrator v. Chaparral, Inc., et al., NTSB Order No. EA-4372 at 3 (1995).

ACCORDINGLY , IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 7-day suspension of respondent's airman certificates, including his ATP certificate, shall begin 30 days after the service date of this opinion and order.<sup>13</sup>

HALL, Chairman, FRANCIS, Vice Chairman, and BLACK, Member of the Board, concurred in the above opinion and order. Member GOGLIA did not concur and submitted the following statement. Member HAMMERSCHMIDT dissents and concurs, in general, with Member GOGLIA's statement, in particular as concerns Section 91.13(a) .

John J. Goglia, Member, dissenting:

After reviewing the pleadings and the transcript of the hearing in this case, as well as prior history, I see no justification for finding any violation or for the penalty imposed upon Captain Mayne. Moreover, section 91.13 has come to be routinely asserted along with applicable regulations, and is in danger of losing its independent significance.

To briefly review the facts, Captain Mayne was pilot-in-command of Trans World Airlines Flight 211 from Atlanta, Georgia to St. Louis, Missouri, on October 21, 1994. Flight 211 was a MD-80 type aircraft with two flight crew members and four cabin crew members. Shortly before pushback, two late passengers boarded the then-full aircraft, and the cabin door was closed. The aircraft began to push back from the boarding gate at some point while the passengers were being seated. The flight attendant, who was assisting the late arrivals, informed Captain Mayne that there was a passenger 'who was not yet seated, and he

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EA-3759 at 8-9 (1993); Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987) .

<sup>13</sup>For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).

immediately stopped the aircraft until that passenger was seated. Following the flight, a passenger reported the incident to the airline, adding that the rear emergency evacuation slide adjacent to his seat was not engaged at the time the pushback began. The incident was reported to the FAA, and certificate action was taken against Captain Mayne.

The transcript of the hearing suggests a discrepancy between the testimony of the Administrator's witnesses, passengers Stokes and Poole, and that of the respondent's witness, flight attendant Kechum, regarding the number of passengers that may have been standing at the time the aircraft was pushed from the gate. Having no reason to doubt the credibility of any of the witnesses, and by reading the testimony together, a totally consistent view is possible. The two late arrivals consisted of one woman carrying a baby and a second woman who was assisting the first by carrying her bag. Flight attendant Ketchum seated the woman with the baby just forward of Mr. Stokes, requiring one passenger to swap sides of the aircraft to allow her to be seated, and stowed her bag. The second woman, now carrying only her own bag, returned forward where she was seated just forward of Mr. Poole.

Both passenger Poole and flight attendant Ketchum reported the late arriving passengers. passenger Poole, specifically, noticed a woman walk aft carrying two bags, and returning forward carrying only one; obviously the second woman had been seated by flight attendant Ketchum. passenger Poole stated that the pushback started "real shortly" before the woman passed him going forward. (T-49)

Flight attendant Ketchum testified that the pushback began as she walked forward to seat the second woman, and that she continued to the cockpit to inform the Captain that a passenger was not yet seated. (T-70) This is consistent with passenger Poole's recollection of when the pushback began. As she walked forward, flight attendant Ketchum sent another flight attendant to assist the passenger. (T-70) After informing Captain Mayne and assisting the last passenger, flight attendant Ketchum went to the rear and engaged the rear emergency slide. (T-70)

Passenger Stokes testified that three persons were standing at the start of the push-back, but could not state whether any of these individuals was a flight attendant. (T-21) Passenger Stokes also stated that the emergency evacuation slide was not engaged at the time the pushback began, but that it was armed a "few seconds" after the pushback began. (T-22) He testified that the entire pushback took only ten seconds, and that all passengers were seated when the emergency slide was engaged. (T-36) Given the most likely sequence of events, and by using passenger Stokes' own time estimates, two of the three persons he saw standing must have been the flight attendants assisting the last passenger.



Captain Mayne did not violate FAR 121.51(a) by allowing the aircraft to be pushed back from the boarding gate because, again, he had no duty to ascertain whether the emergency evacuation slides were engaged. The Captain has numerous critical duties related to the safe operation of the pending flight. These include pre-flight planning, configuring the aircraft for flight, verifying weight and balance and fuel, activating systems for takeoff, and communicating with air traffic control and airport traffic control. One of the flight attendants' primary responsibilities is the safe seating of the passengers. This division of duties is underscored by the TWA manuals, which did not require the captain to verify that the passengers were seated. (The TWA manuals were subsequently revised.) Once the cabin door closed, Captain Mayne was entitled to expect that the flight attendants had seated the passengers and engaged the emergency slides as stated in TWA manuals. As a general rule, the pilot-in-command (PIC) is responsible for the overall safe operation of the aircraft. However, where a particular task is the responsibility of another, the PIC has no obligation to act unless he has reason to question the other's performance. He cannot be found guilty of a violation for that person's failure in his/her duty. *Administrator v. Krueger*, EA-4302 (1994).

In addition, Captain Mayne was not in violation of any other regulation, even assuming that one or even two passengers were being seated during pushback. In one of the first "standing passenger" cases presented to the Board, *Administrator v. James Lawson*, 5 NTSB 1514 (1986), the FAA took the position that commencing to taxi while one of two late arrivals were still searching for their seats would NOT constitute a violation of any regulation. In that case, both the FAA and the Board noted that there were 18 to 20 passengers standing at the time of pushback and 10 to 20 at the start of taxi. Moreover, the captain in that case admitted that he was aware that the passengers were standing, and commenced his taxi anyway. The undisputed testimony in this case is that Captain Mayne was not aware that any passenger was standing.

Moreover, Captain Mayne did not violate FAR 91.13(a) because he had no duty to determine whether all the passengers were seated under either the FARs or the TWA manuals, and he was neither careless nor reckless in his actions. He was not aware of any standing passenger when the pushback began, and he stopped the pushback immediately upon being informed that a passenger was standing. Also of importance is that Captain Mayne never taxied the aircraft. In all prior "standing passenger" cases presented to the Board, both the FAA and the Board made a distinction between merely pushing back and taxiing the aircraft. Those cases, however, dealt with aircraft that were actually taxied with passengers out of their seats, and the importance of the **distinction was never discussed.**

Finally, we should address the increasing use of section 91.13 as a "catch all" regulation, broadly applying it as an add-on additional charge to other violations of the FARs. Section 91.13 prohibits the "careless or reckless" operation of aircraft, which endangers the life or property of another, giving little or no guidance for what would constitute such operation. By its wording, the "careless or reckless" regulation refers to any operation, which potentially endangers the life or property of another. Viewed broadly, 91.13 could be applied to all violations of the FARs, which would render the section redundant and unnecessary. Assuming, however, that no section is superfluous, a reasonable interpretation is that the section is intended to apply to unsafe operations for which no specific regulation exists, or in instances where the actions of the accused are so egregious as to warrant the additional charge. A charge of careless or reckless operation moreover, is extraordinarily serious. The terms "careless" and "reckless" are used in both criminal and civil courts and carry with them certain extreme connotations. The terms imply instances of extreme misconduct, which evidences a total disregard for the life or property of another. For these reasons, a finding of violation of section 91.13 would cause commercial airlines, which owe their passengers the highest duty of care, to disregard any such applicant. section 91.13 should be applied sparingly to instances involving conduct, which warrants only extreme action.

Captain Mayne should not be found in violation of any FAR based on the above facts. He had no actual knowledge that any passenger was not seated, and no specific duty to ascertain whether all passengers were seated or whether the emergency slides were armed under either the FARs or TWA's FAA-approved operations manual. Captain Mayne was neither careless nor reckless in his operation of Flight 211, but showed the utmost care for the safety of the flight and his passengers. Given the testimony of the witnesses, it is difficult to understand why any certificate action was taken in the first place.

According to the statement of the very witness who first reported the incident, the entire pushback lasted for only ten seconds. All passengers were seated and the emergency slide engaged within a few seconds of the start of the pushback. The unblemished thirty-one year airline career of a professional pilot, therefore, has been placed in jeopardy over the events of three seconds, none of which were his responsibility. Captain Mayne, therefore, should be absolved from any further proceedings in connection with this incident.